The Incident of Suvivorship in Ohio

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Frequently individuals wish to have title to property so divided between two or more persons that on the death of one of them the entire ownership will be vested automatically in the survivors. Situations in which this desire is commonly manifested are where the husband and wife buy a home or make some other permanent investment of a substantial character; where persons have a joint bank account; or where property is left in trust with co-trustees. In most jurisdictions the estate by entireties or of joint tenancy is an appropriate device for the accomplishment of the desired objective, but in Ohio there is doubt as to the availability of these devices.[1] The assertion that there is no joint tenancy in Ohio has been made so often that the courts feel constrained to deny the existence of any estate with an incident of survivorship. Yet they frequently reach conclusions not only consistent with such an estate but best explained on an assumption of its existence.

IN GENERAL

The estate of joint tenancy has been known to the common law for many centuries. Its history can be traced back to the thirteenth century.[2] Littleton indicates that this estate had taken definite form distinguishing it from other forms of concurrent ownership by the fifteenth century.[3] Its outstanding characteristic has always been the jus accressendi or right of survivorship.[4] By force of this incident, on the death of one of

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[1] A cotenancy for the lives of the co-owners with remainder to the survivor might also be used in some situations but this device would not occur to most laymen and many lawyers. This device is in many respects quite different from a joint tenancy as is pointed out at page 64 *infra*.

[2] Bracton, De Legibus, (Twiss ed. 1878) Sec. 13.

[3] Littleton, Tenures (Wambaugh ed. 1903), Secs. 277-291.

[4] The phrases "incident of survivorship" and "right of survivorship" are used synonymously.

the joint tenants his share belongs to the surviving tenants instead of passing to the heirs or devisees of the deceased tenant as would be the case on the death of a tenant in common. The incident of survivorship is a result of the theory of unity of ownership of the joint tenants. This theory indulges in the fiction that all the joint tenants together constitute but one owner and consequently the fictitious single ownership continues in spite of the death of a tenant.[5]

During the feudal period it was seen that an estate with an incident of survivorship could be used by a tenant to avoid the burdensome feudal incidents of wardship and relief.[6] This could be done by making a conveyance of the tenant's estate to several men, usually much younger than the particular tenant, who would agree to hold the property in trust for the grantor during his life and for his heir after his death. The chancery court would enforce the trust and on the death of the tenant the overlord would not be entitled to a relief or wardship of the minor heir because legal title was in the trustees. Although the overlord would theoretically have similar rights against the survivor of the trustees, ordinarily the last survivor of the young men selected as trustees would live until the tenant's heir became of age. The legal title would then be conveyed to the heir by the trustees. The transaction resulted in the payment of two fines from the tenant's estate for the two conveyances but it saved the tenant's heir from the much more onerous feudal incidents of wardship and relief.

Because of the advantages it offered a tenant in avoiding feudal incidents, the estate of joint tenancy was favored by the early common law courts. As a matter of construction a court would tend to find a joint tenancy whenever a conveyance was made to two or more persons unless the language of the conveyance indicated that some estate other than joint tenancy was contemplated. After the breakdown of the feudal system the

[5] Blackstone, Commentaries (Lewis ed. 1902) vol. II, 179-195); Tiffany, Real Property (2d ed. 1920) vol. I, sec. 190.

[6] Pollock & Maitland, History of English Law (1923) vol. II, p. 20.

reason for this preference was gone and survivorship was frowned upon as making no provision for posterity. The construction preferred since that time has been against joint tenancy and in favor of tenancy in common.[7]

Although it is a characteristic of the estate of joint tenancy that the ownership of the estate will pass to the surviving joint tenant, it has always been possible for any joint tenant to sever the joint tenancy as to his proportionate interest by a conveyance inter vivos. The grantee would then take the grantor's share as a tenant in common without any incident of survivorship.[8]

At common law a conveyance to a husband and wife was regarded as creating a tenancy by entireties rather than a joint tenancy. The tenancy by entireties also has the incident of survivorship. The unique qualities which distinguish this estate from the joint tenancy are the requirement that the tenants be husband and wife, and the inability of a tenant to defeat the incident of survivorship by a conveyance.[9] Estates by entireties were an outgrowth of the common law concept of husband and wife as a single entity and it may well be questioned whether according to present day standards there should be greater stability to the incident of survivorship where the cotenants are husband and wife than there is where the cotenants are not married to each other. While the estate has been repudiated in many jurisdictions in others it is regarded as still existing, unaffected by the "Married Women's Property Acts" or even by statutes which modify the ordinary joint tenancy.[10]

In most of the states there are statutes with reference to joint tenancies. Many of these statutes simply state a preference as a matter of construction in favor of a tenancy in common

[7] Tiffany, *op. cit.*, p. 631; 23 Harv. L. Rev. 214 (1910).

[8] Littleton, *op. cit.* sec. 292; Blackstone, *op. cit.* pp. 185-186; Tiffany, *op. cit.* p. 637.

[9] In general on tenancies by entireties see Tiffany, *op. cit.*, sec. 194; Thompson, Real Property (1924) vol. II, Sec. 1735-1765.

[10] Brewster Conveyancing (1904) secs. 163-165; Tiffany, Real Property (2d ed. 1920) vol. II, pp. 650-651.

as against a joint tenancy but in some states the statutes substantially abolish the estate of joint tenancy. Under either type of statute conveyances to co-trustees are commonly excepted, and under statutes creating a presumption in favor of tenancies in common, conveyances to husband and wife are also sometimes excepted.[11]

Tenancy by Entireties

In Ohio the tenancy by entireties has never been recognized as an estate distinct from that of joint tenancy.[12] *Sergeant* v. *Steinberger*[13] was the first case involving the problem of survivorship to reach the Ohio Supreme Court. The property in litigation was owned concurrently by a husband and wife. In denying the existence of an incident of survivorship the court assumed it was denying the existence of the estate of joint tenancy. In subsequent cases there has been a similar failure to distinguish between joint tenancy and tenancy by entireties,

[11] The following statutes raise a presumption in favor of a tenancy in common but except conveyances to co-trustees from this presumption; Delaware, Revised Code (1915) Sec. 3270; District of Columbia, Code (1929) Title 25, Sec. 276; Indiana, Stat. Ann. (1933) vol. II, Sec. 56-111 and Sec. 56-112; Maine, Revised Stat. (1930) Sec. 13, p. 1233 and Sec. 19, p. 1234; Michigan Comp. Laws (1929) Secs. 12964 and 12965; Minnesota, Mason's Statutes (1927) Sec. 8074; Missouri, Stat. Ann. (1932) Vol. III, Sec. 3114; Mississippi, Hemingway's Code (1927) Sec. 2429; Montana, Revised Code (1921) Sec. 6680; North Dakota, Compiled Laws (1913 Sec. 5262; South Dakota, Compiled Laws (1929) Sec. 269; Vermont Gen. Laws (1917) Sec. 2728. Conveyances to husband and wife are also excepted in the Arizona, Indiana, Michigan, Missouri, and Vermont statutes.

The following statutes abolish joint tenancies or the right of survivorship: Alabama, Code (1928) Sec. 6924; South Carolina, Code (1932) Sec. 8911; Tennessee, Williams' Code (1934) Sec. 7604; Washington, Remington's Revised Statutes (1932) Sec. 1344; but in the following statutes conveyances to trustees are excepted: North Carolina Code (1931) Secs. 1735 and 1736; Oregon, Code (1930) Vol. III, Secs. 63-207 and 63-209; Pennsylvania, Purdon's Statutes (1936) Title 20, Sec. 121; Virginia, Code (1930) Secs. 5159 and 5160. For a more complete enumeration of statutes as of 1924 see Thompson, Real Property (1924) Vol. II, Secs. 1720 and 1721.

[12] *Ibid*, Sec. 1721; See *Tax Comm.* v. *Hutchison*, 120 Ohio St. 361 at 367 (1929); *Gleason* v. *Squires*, 34 Ohio L.Rep. 432, 9 Ohio L. Abs. 729 (1931).

[13] 2 Ohio 305, 15 Am. Dec. 553 (1826).

the uniform assumption being that the problem of survivorship as an incident of an estate is presented only by the estate of joint tenancy.[14] Inasmuch as the tenancy by entireties owed its distinctive qualities to the common law fiction of the oneness of husband and wife it would seem that the abrogation of that fiction should result in a refusal to recognize the distinctive qualities of the tenancy by entireties. Under the Ohio statutes a husband and wife are clearly separate entities.[15] This fact coupled with the failure of the Ohio courts to mention estates by entireties where the cotenants are husband and wife would seem to justify the conclusion that there is no such estate in Ohio. Consequently the question of the existence of an incident of survivorship would seem to be primarily a problem of recognition of joint tenancies, whether the cotenants are husband and wife or parties not married to each other.

Joint Tenancy Between Co-Trustees

It is very advantageous for co-trustees to hold by an estate which has an incident of survivorship so that the administration of the trust will not be impeded by title complications on the death of a trustee. By this device the practical abeyance of title may be avoided during the probate proceedings for the estate of the deceased trustee. The statutes in many jurisdictions abrogating the estate of joint tenancy or changing the presumption of co-ownership from one favoring joint tenancy to one favoring tenancy in common except conveyances to co-trustees.[16] Ohio has never had any such statute dealing with the general recognition of joint estates. The rule of non-recognition has been judicially developed and the Ohio Supreme Court has not admitted making an exception to the rule in the case of co-trustees.

[14] *Lewis* v. *Baldwin*, 11 Ohio 352 (1842); *Wilson & Marsh* v. *Fleming et al*, 13 Ohio 68 (1844); *Penn* v. *Cox*, 16 Ohio 30 (1847); *Farmers' & Merchants' National Bank* v. *Wallace*, 45 Ohio St. 152, 12 N.E. 439 (1887).

[15] Gen. Code, Secs. 7995-8004.

[16] *Supra* n. 11.

In 1840 in the case of *Miles* v. *Fisher*,[17] a devise was made in what seems to have been a perpetual trust to three trustees "as joint tenants and not as tenants in common." One of the trustees died and an heir of the settlor brought ejectment. The court refused to allow the plaintiff's action but it asserted that there is no joint tenancy in Ohio. In support of its holding against the plaintiff's action the court propounded a theory that each trustee took an estate for life in an undivided one-third of the property granted to each of the other trustees. This theory seems to have had no foundation in the language of the testator but it enabled the court to permit the trust to continue undisturbed through the life of the survivor of the trustees. The court's assumption that trustees in a perpetual trust take only life estates in the absence of words of inheritance was repudiated in a later case.[18] This repudiation destroys the basis of the artificial theory used by the court to find a passing of the title to the surviving trustees.

A few years after this decision a statute was passed which was designed to lessen the inconvenience resulting from co-trustees not holding as joint tenants.[19] The statute provided that a surviving testamentary trustee should have power to administer the trust unless the will showed a contrary intent. It has been assumed that this statute did not make the trustees joint tenants of the trust property.[20] In 1932 this provision was modified and amplified to read "When two or more fiduciaries have been appointed *jointly* to execute a trust, and one or more of them dies, declines, resigns, or is removed, the title shall pass to the surviving or remaining fiduciary or fiduciaries who shall

[17] 10 Ohio 1 (1840).

[18] *Williams* v. *The First Presbyterian Society in Cincinnati*, 1 Ohio St. 478 (1853); see also, *Vaughan* v. *Zitscher*, 4 Ohio N.P. N.S. 90, 17 Ohio Dec. 184 (1906).

[19] 50 Ohio L. 309 (1852); Gen. Code, Sec. 10,595 prior to 1932; "When two or more trustees are appointed by will, to execute a trust, and one or more of them dies, declines, resigns, or are removed, the survivors or remaining trustees or trustee may execute the trust, unless the terms of the will express a contrary intention."

[20] *Winder* v. *Scholey*, 83 Ohio St. 204, 93 N.E. 1098 (1910). And see *Sowers* v. *Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418 (1883).

execute the trust, unless the creating instrument expresses a contrary intention or unless the court on the application of one or more of the beneficiaries or other persons interested in the trust so determines. . . ."[21] This provision seems to permit a joint tenancy between trustees of a testamentary trust. There is some ambiguity in the language so that it is not entirely clear whether there is a presumption in favor of a joint tenancy. If the word "jointly" appearing in the first part of the provision were omitted it would seem that a presumption in favor of a joint tenancy would be raised by the clause "unless the creating instrument expresses a contrary intention." Probably the word "jointly" was not intended in a technical sense and it would seem desirable to construe it as meaning "concurrently" in order to construe the statute as creating a presumption in favor of a joint tenancy.

There is no express statutory provision for conveyances to non-testamentary co-trustees but the recognition of the estate of joint tenancy between such co-trustees is similarly desirable.[22] Such recognition may require an exception in favor of co-trustees to the judicial non-recognition of joint tenancies in Ohio; or, what is more desirable a repudiation by the courts of early dicta against the incident of survivorship and a recognition of joint tenancies wherever it is clear that such estates were intended whether the tenants be co-trustees, husband and wife, or other parties.

Joint Tenancy in Real Property

Most of the cases in which the Ohio Supreme Court has purported to deny the existence of the estate of joint tenancy have involved conveyances of real property. In these cases a reason occasionally advanced to justify a refusal to recognize a joint tenancy is that the jus accrescendi or right of survivor-

[21] Gen. Code, Sec. 10,506-56 (1932).

[22] Gen. Code, Sec. 10,506-56 is limited to situations where two or more "fiduciaries" are appointed to execute a trust. In Sec. 10,506-1 "fiduciary" is defined as a person appointed by and accountable to the probate court.

ship is not founded on principles of natural justice.[23] Courts which have made this statement have failed to give it meaning by specifically indicating what are the "principles of natural justice" which survivorship violates. Two more specific if not more convincing reasons have been advanced occasionally. These are: the estate is inconsistent with a statute which authorizes partition by joint tenants; and, the estate is inconsistent with our system of descent.[24]

It has always been within the power of a joint tenant to defeat the incident of survivorship by an ordinary conveyance which would make the grantee a tenant in common. It can be seen that under a statute which permitted partition by tenants in common a joint tenant could easily bring himself within the scope of the statute by a conveyance to, and a reconveyance from, a third person. A statute which gives the power of partition directly to joint tenants and thus obviates the necessity for a preliminary transaction to convert the joint tenancy into a tenancy in common, does not seem like such a drastic innovation as to amount to an abrogation of the estate. A similar statute, enacted in England in 1539, has not been considered equivalent to a repudiation of the joint estate[25] and in many states in this country a statutory power to partition is regarded as entirely consistent with the existence of a joint tenancy.[26] On the

[23] *Sergeant* v. *Steinberger*, 2 Ohio 305, 15 Am. Dec. 553 (1826); *Farmers' & Merchants' National Bank* v. *Wallace*, 45 Ohio St. 152, 12 N.E. 439 (1887); and see *Wilson & Marsh* v. *Fleming*, 13 Ohio 68 (1844).

[24] Reasoning that the estate of joint tenancy is inconsistent with a statute which authorizes partition by a joint tenant, *Sergeant* v. *Steinberger*, 2 Ohio 305, 15 Am. Dec. 553 (1826); *Moore's Lessee* v. *Armstrong*, 10 Ohio 11, 36 Am. Dec. 63 (1840); *In re Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929); *Foraker* v. *Kocks*, 41 Ohio App. 210, 36 Ohio L.Rep. 156 (1931); reasoning that the estate of joint tenancy is inconsistent with our system of descent, *Moore's Lessee* v. *Armstrong*, 10 Ohio 11, 36 Am. Dec. 63 (1840).

[25] 31 Ken. VIII c. 1, 2, & 3 (1839); for a discussion of the statute see Williams, Real Property, 23d ed. (1920) pp. 149-151.

[26] See for example: Delaware, Revised Code (1915) Sec. 3270 Sec. 3; Illinois Revised Statutes, Cahill (1929) Ch. 106, Sec. 1; Indiana Stat. Ann. (1933) Vol. II, Sec. 3-2401; Michigan Comp. Laws (1929) Sec. 14995; Minnesota, Mason's Statutes (1927) Sec. 95-24; Missouri, Stat. Ann. (1932) Vol. II, Sec. 1545; Montana, Revised Code (1921) Sec. 9516. Although a

other hand authority in accord with the Ohio position as to the effect of the partition statute seems to be entirely lacking.

The supposed inconsistency between an incident of survivorship and our system of descent has been referred to earlier as a reason advanced for changing to a presumption in favor of tenancy in common after the breakdown of the feudal system.[27] This system of descent does favor the passing of property along certain prescribed lines to relatives according to the proximity of relationship. This may justify a preference for tenancy in common as against joint tenancy as a matter of construction but it does not seem to be adequate justification for a complete repudiation of the joint tenancy. Our system of descent is subject to a property owner's power to make a disposition inconsistent with the course of descent and to his power to create certain estates which do not pass by descent. Thus he can defeat an heir's expectancy by making a gratuitous transfer to a stranger and he may create estates such as those for life and at will which do not have the quality of inheritability. This is true in Ohio as well as in other jurisdictions. No particular phase of our system of descent has been pointed out as presenting a peculiar obstacle to the recognition of an estate with an incident of survivorship. Inasmuch as many jurisdictions which recognize the estate of joint tenancy have systems of descent similar to ours the assertion of inconsistency is not persuasive.[28]

There are five cases in which the Ohio Supreme Court is supposed to have held that there is no joint tenancy in real property in this state. In none of these cases was a denial of the existence of the estate of joint tenancy necessary to justify the disposition which the court made of the litigation. In three of the cases a claim for survivorship was not allowed but the holding could have been based on a presumption in favor of

former Ohio statute purported to give joint tenants power to partition, 29 Ohio Laws 254, the present partition statute does not mention joint tenants. Gen. Code Sec. 12,026.

[27] *Supra*, p. 49-50.

[28] See n. 11 *supra*.

tenancy in common;[29] in a fourth case where a claim for survivorship was not allowed the holding was consistent with a theory that what had been a joint tenancy in its inception, had been converted to a tenancy in common by a mortgage by one of the cotenants;[30] in the fifth case a survivorship was permitted although the court denied that it was allowed on a theory of joint tenancy.[31]

The first of these cases was *Sergeant* v. *Steinberger*[32] decided in 1826. The case has become a leading authority against the existence of joint tenancies in Ohio. The controversy in that case grew out of a devise of a fee simple estate by a testator to his daughter and her husband. The son-in-law survived his wife and after his death a dispute as to the ownership of this property arose between the heirs of the daughter and the devisees of the son-in-law. The court decided that the daughter and her husband were tenants in common. The devise did not contain any language indicating an intent to create an estate with an incident of survivorship and so the court's conclusion would have been entirely explainable on the basis of a presumption in favor of a tenancy in common. There was a similar lack of evidence of intent to create an estate with the incident of survivorship in the subsequent cases of *Wilson and Marsh* v. *Fleming* and *Penn* v. *Cox*.[33] Although the court in each of these cases talks in terms of repudiation of the estate of joint tenancy the actual disposition is consistent with an acceptance of the estate of joint tenancy with a presumption in favor of the tenancy in common.

Unlike the cases just discussed, the case of *Farmers' and*

[29] *Sergeant* v. *Steinberger*, 2 Ohio 305, 15 Am. Dec. 553 (1826); *Wilson & Marsh* v. *Fleming*, 13 Ohio 68 (1844); *Penn* v. *Cox*, 16 Ohio 30 (1847); and see *Tabler* v. *Wiseman*, 2 Ohio St. 208 (1853); *Thompson* v. *Heirs of Dingman*, 2 Ohio Dec. Rep. 711 (1863).

[30] *Farmers' & Merchants' National Bank* v. *Wallace*, 45 Ohio St. 152, 12 N.E. 439 (1887).

[31] *Lewis* v. *Baldwin*, 11 Ohio 352 (1842).

[32] 2 Ohio 305, 15 Am. Dec. 553 (1826).

[33] Note 30, *supra*.

Merchants' National Bank v. *Wallace*[34] involved a conveyance in which the language indicated an intention to create a joint tenancy. The controversy was between one of the tenants and a mortgagee of the other. Both tenants were alive at the time. The court refused to enjoin a foreclosure by the mortgagee. It does not appear that foreclosure was attempted on more than a one-half interest in the premises. It has been held that a mortgage by a joint tenant, like a conveyance by deed, works a severance of the joint estate to the extent of the encumbrance, so that the mortgagee acquires the same type of interest which he would acquire if the mortgagor were a tenant in common.[35] Accepting this theory, the result in *Farmers' and Merchants' National Bank* v. *Wallace* is consistent with a recognition of the estate of joint tenancy although the court assumes that it is not.

In *Sergeant* v. *Steinberger*[36] the court was emphatic in its denunciation of the incident of survivorship as "not founded on principles of natural justice" and "contrary to the habits and feeling of the people of this state." In view of this position it is interesting that the Supreme Court permitted a survivorship in the first case to come before it in which there was clear evidence that the grantor intended to create an estate with such incident. This case was that of *Lewis* v. *Baldwin*[37] in which there was a conveyance to a husband and wife "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs or assigns." After the death of the wife, her heirs claimed as tenants in common with the husband. The court found that the property belonged to the husband to the exclusion of his wife's heirs "not on the principle of survivorship but as grantee in fee as survivor." It is not clear what distinction the court meant to suggest by these words but apparently the court intended to take the general position that a survivor-

[34] 45 Ohio St. 152, 12 N.E. 439 (1887).

[35] *Wilkins* v. *Young*, 144 Ind. 1, 55 Am. St. Rep. 162 (1895); and see Tiffany, Real Property (1920) 2d ed., Vol. I, pp. 638-639.

[36] *Supra*, n. 32.

[37] 11 Ohio 352 (1842).

ship should be permitted when the language of the conveyance clearly indicates an intention for such an incident. This position was accepted a few years ago by a common pleas court which asserted that the early Ohio cases such as *Sergeant* v. *Steinberger* are not applicable where survivorship is by the act of the grantor.[38] This seems to be simply another way of stating the view generally held in other states that, while there is a preference for the tenancy in common as a matter of construction, the estate of joint tenancy will be recognized where the language of the conveyance clearly indicates an intention to create it.

Inasmuch as the disposition of the cases of concurrent ownership of real property has been consistent with the existence of the estate of joint tenancy the courts' opinions repudiating that estate can be regarded as dicta. If this view is accepted the decided cases present no serious obstacle to an acceptance of the general rule of recognition of joint tenancies with a presumption in favor of tenancies in common. Furthermore, there is not the logical consistency which is expected of courts if a rule is applied in one case and repudiated in another similar case. It may well be questioned whether there is a substantial basis for denying the incident of survivorship in cases of real property and recognizing it in cases of bank accounts.

Joint Bank Accounts

It has generally been supposed that a joint tenancy can exist in personal property as well as in real property and at the present time problems of joint ownership and survivorship arise most frequently in connection with joint accounts.[39] In these situations Ohio courts have quite uniformly sustained the validity of an express provision for survivorship between

[38] *In re Estate of Dennis*, 30 Ohio N.P. N.S. 118 (1928).

[39] "And as the survivor holds place between joint-tenants, in the same manner it holdeth place between them which have joint estate or possession with another of a chattel, real or personal." Littleton, Tenures (Wambaugh ed. 1903), Sec. 281.

so-called joint depositors.[40] On the analysis suggested in the preceding pages this conclusion is consistent with the actual holding in most of the earlier cases but it is not consistent with their language. Accordingly it would seem to be desirable for the courts to repudiate the opinions of those earlier cases or to distinguish those situations from the joint account situation.

The Supreme Court did neither of these things in the first case in which the question of survivorship in a joint account

[40] *Cleveland Trust Co.* v. *Scobie*, 114 Ohio St. 241, 151 N.E. 373, 48 A.L.R. 182 (1926); *Tax Comm.* v. *Hutchison*, 120 Ohio St. 361, 166 N.E. 352 (1929); *Yost* v. *Schmitt*, 128 Ohio St. 48, 190 N.E. 403 (1934); *Oleff* v. *Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935); *Osterland* v. *Schroeder*, 22 Ohio App. 213, 153 N.E. 758 (1926); *Union Trust Co.* v. *Hutchison*, 27 Ohio App. 284, 161 N.E. 222 (1927); *In re Estate of* Shangle, 32 Ohio L.Rep. 185, 8 Ohio L.Abs. 621 (1930); *Hutchison* v. *Union Trust Co.*, 26 Ohio N.P. N.S. 499 (1927); *Buckeye State B. & L. Co.* v. *Fridley*, 28 Ohio N.P. N.S. 254 (1930); *Pindras* v. *Cleveland Trust Co.*, 33 Ohio L.Rep. 423 (1930); *Gors* v. *Huss*, 10 Ohio L. Abs. 173 (1931); *In re Vollmer*, 30 Ohio N.P. N.S. 289 (1933), aff'd *Vollmer* v. *Vollmer*, 47 Ohio App. 154, 16 Ohio L. Abs. 107 (1933); *Ryan* v. *Henney*, 20 Ohio L. Abs. 518. Cf. *In re Estate of Ellen Morgan*, 28 Ohio C.A. 222 (1918). Those cases are to be distinguished in which there are no words indicating an intention to create a right of survivorship. *Bender* v. *Cleveland Trust Co.*, 123 Ohio St. 588, 176 N.E. 472 (1931). *In re Estate of Burns*, 21 Ohio L. Abs. 148 (1935); *Baker* v. *Dollar Savings and Trust Co.*, 39 Ohio L.Rep. 659; 15 Ohio L. Abs. 385 (1933).

Also to be distinguished are the cases in which the court finds no effective delivery of an intent to the non contributing co-owner of an account. *Schmitt* v. *Schmitt*, 39 Ohio App. 219, 28 Ohio L.Rep. 522 (1928); *Kinder* v. *Nelson*, 9 Ohio L. Abs. 425 (1930); *Held* v. *Myers*, 48 Ohio App. 131, 16 Ohio L. Abs. 490 (1934). In *Bender* v. *Cleveland Trust Co.*, 123 Ohio St. 588 at 593 it is suggested that there is not a similar problem of delivery in situations where words of survivorship are used. This seems to be a misconception. If the rights of the non contributing party are to be sustained on a theory of gift, it is as important to show delivery when he takes as a tenant in common as it is when he takes as joint tenant with right of survivorship. In either case delivery is necessary to show a transaction sufficient to create the rights of an owner in the non-contributing party. If his rights are to be sustained on a theory of donee beneficiary of a contract a showing of delivery is not necessary in either type of situation. For a discussion of the theories on which the interest of the non-contributing party can be supported see: Rowley, Living Testamentary Dispositions, 3 Cinn. L. Rev. 361 at 378-389 (1929); The Ohio Rule on Contracts for the Benefit of a Third Party, 3 Cinn. L. Rev. 310 (1929); Joint Tenancies in Bank Accounts, 38 Harv. L. Rev. 243 (1925); Deposit in Name of Depositor and Another. 48 A.L.R. 189, 66 A.L.R. 881.

was presented to it. The case was that of *Cleveland Trust Co.* v.*Scobie*[41] decided in 1926, and the only point discussed by the court was whether the transaction amounted to a present gift of an interest to the noncontributing co-owner of the account. The court found a completed gift and held that the noncontributing co-owner, as survivor, was entitled to the balance of the account. In giving the opinion of the court, Judge Allen ignored the earlier opinions against the incident of survivorship and assumed that if the court found a gift of a joint interest the incident of survivorship would attach to it. No reason was offered for the tacit assumption that the problem of recognition of incident of survivorship is different in cases of real property from what it is in cases of joint accounts or other personal property.

Three years later the court held that a succession tax is leviable against an interest taken by survivorship in a joint bank account.[42] In reaching this conclusion the court asserted that the co-owners of a bank account are "quasi joint tenants," with the right of survivorship. There was no discussion of the theory on which this right was recognized and the court simply cited the Scobie case to support its conclusion. The case gives no indication as to whether the court thought that survivorship should be recognized in joint tenancies as well as "quasi joint" tenancies.

About a month later in the case of *In re Hutchison*[43] the court discussed its recognition of survivorship in a personal property situation. In this case the controversy was between the widow of James Hutchison and his executor over the ownership of certain shares of stock. The shares were evidenced by a certificate in which there was the following ownership clause: "This is to certify that James Hutchison and Letitia Hutchison, as tenants in common for their respective

[41] 114 Ohio St. 241, 151 N.E. 373, 48 A.L.R. 182 (1926).

[42] *Tax Comm.* v. *Hutchison*, 120 Ohio St. 361, 166 N.E. 352 (1929); and see *Tax Comm.* v. *Reeves*, 11 Ohio L. Abs. 154 (1931).

[43] 120 Ohio St. 542, 166 N.E. 687 (1929).

lives remainder in whole to their survivor is the owner. . . ." The money for the purchase of this stock was withdrawn by James from a joint bank account which he had with his wife. From the statement of the case it appeared that James and his wife had been married many years; at the time of their marriage neither had any property, and "their accumulations of property of every kind were at all times owned jointly by them." Both the Common Pleas Court and the Court of Appeals held that the provision for survivorship was ineffective. In this they were reversed by the Supreme Court.

The opinion of the court was given by Chief Justice Marshall. He found a contract for survivorship between James and Letitia, stating: "Inasmuch as the transaction was permitted to remain undisturbed for a period of two years before the death of James, it must be presumed that Letitia Hutchison knew of the use of her funds, and that she was fully consenting to the title to the stock being taken as it was in fact taken. The contract, therefore, fully meets the requirements of mutuality." Having found that the parties intended to contract with each other the court then found that the language used by them in the certificate was appropriate for "each to make an irrevocable grant of his undivided one-half interest in the stock to the other, to take effect upon the death of either." This, in the court's opinion, created in each party an undivided one-half interest during their joint lives and a remainder in the one-half interest of the other. This latter conclusion seems unexceptionable if one accepts the court's finding of a contract between the parties. The opinion favorable to the survivor might then have been rested on the determination that the transaction had created a valid remainder in favor of the survivor. Instead the court based the survivor's right on the theory that the incident of survivorship would be recognized when created by contract between the parties. This basis for the court's conclusion is difficult to accept for two reasons. First, no reason is apparent for requiring a contract between the co-owners for the creation of an incident of survivorship.

Second, there was no incident of survivorship in the case before the court unless it is assumed that a remainder to the survivor is the same thing as an incident of survivorship.

The requirement of a contract between the co-owners creating a right of survivorship seems to have originated with this case. A life estate, a fee, a vested remainder, and even a tenancy in common is as valid when created by will or gratuitous grant as when created pursuant to a contract. A joint tenancy or contingent remainder presents no unique problem in this regard and a contract should not be essential to its validity. No corresponding requirement exists in other jurisdictions or in earlier Ohio cases. In the Scobie case[44] there was no contract between the co-owners, the survivor acquired her rights as donee and was allowed to take by the incident of survivorship. In the earlier case of *Jeffers* v. *Lampson*,[45] where, like in the Hutchison case, there was no true incident of survivorship, a limitation in favor of the survivor of co-owners was regarded as a valid executory limitation even though the interests involved were created by the will of the father of the co-owners. From the standpoint of social policy or of legal theory it is impossible to see how the incident of survivorship in the Scobie case or the executory limitation in the Jeffers case is more objectionable than similar interests created pursuant to an agreement between the co-owners. In spite of the court's theory, it would seem that the real significance of the contract between the co-owners in the Hutchison case was with respect to the authority of the husband, James, to use funds taken from a joint bank account to create the interests in question in the stock. The finding of this authority was as important to the creation of a life interest in the wife as to the creation of a remainder to her as survivor. After the

[44] *Supra*, n. 41. With the Supreme Court's requirement of a contract compare the suggestion of the Court of Appeals that a full power of disposition in the co-owners is essential for a valid incident of survivorship; such a requirement would seem to be equally unsound. *In re Estate of James Hutchison*, 27 Ohio L.Rep. 628, 6 Ohio L. Abs. 686 (1928).

[45] 10 Ohio St. 101 (1859); and see *Taylor* v. *Foster*, 22 Ohio St. 255 (1871).

court found a transaction sufficient to create certain interests in the wife, the validity of those interests should have been determined without reference to the contract as such.

The court found that the transaction resulted in a remainder in each co-owner conditioned on his surviving the other.[46] Consequently the court's disposition of the case on a theory of an incident of survivorship indicates that the court did not distinguish between a joint tenancy in fee with the incident of survivorship and an estate to co-owners for their lives with remainder in fee to the survivor. It might be pointed out that the incident of survivorship in a joint tenancy in fee could not be a remainder because it is not preceded by a freehold estate of less than a fee. Accordingly it would seem to be much more like an executory estate than a remainder.[47] Aside from nomenclature there are distinctions of substance between an incident of survivorship and a remainder to the survivor of co-tenants for life. A conveyance by a joint tenant of his portion terminates the incident of survivorship as to that portion of the estate.[48] No such consequence follows a conveyance by a co-tenant for life with remainder to survivor. A joint tenant in fee can convey a present fee interest in his portion, a co-tenant for life with remainder to survivor cannot convey a present fee and in some jurisdictions he may be able to convey no more than a life estate, the contingent remainder being inalienable.[49]

[46] The court said that the remainder in Letitia was vested. It does not appear that the decision would have been any different if the court had thought that the remainder was contingent but the court's suggestion that the remainder is vested does not accord with the commonly accepted conception of a vested remainder. The remainder was not in terms to Letitia but to the survivor. During the lives of Letitia and James the survivor was of course unascertained and so the limitation in remainder was contingent. See Gray, The Rule Against Perpetuities, 3d ed. (1915), Sec. 9.

[47] A remainder may be preceded only by a life estate or an estate tail. Simes, Law of Future Interests (1936) Vol. I, Sec. 54.

[48] *Supra*, n. 8.

[49] According to the common law contingent remainders were not alienable inter vivos. Simes, *op. cit.*, Vol. III, Sec. 712. This rule has been changed in Ohio by statute. Ohio Probate Code 1932, Sec. 10,512-4; and see *In re Estate of James Hutchison*, 27 Ohio L.Rep. 628; 6 Ohio L. Abs. 686 (1928).

The marketability of the joint tenants' interests would consequently be much greater than that of the interests of the co-tenants for life. The right of a trustee in bankruptcy or of an attaching creditor, rights as to partition, and liability for waste differ in the joint tenancy and co-tenancy with remainder to survivor.[50] Clearly these interests differ in character as well as in name and it is unfortunate that the court in the Hutchison case felt obliged to justify the right of survivorship. No problem of joint tenancy was before the court and the conclusion that there was a valid remainder in the survivor was enough to distinguish the cases which had dealt with a right of survivorship.

The reasoning of the Hutchison case was not followed by the Supreme Court in the next survivorship controversy presented to it. In this case, *Oleff* v. *Hodapp*,[51] the question was presented in connection with a joint account where one co-owner had murdered the other. The survivor was a donee beneficiary of a joint interest in the account and so on the implications of the Hutchison case would not have been entitled to take by survivorship since there was not a contract between

[50] In a joint tenancy a severance of the joint interest will occur when there is a transfer to a trustee in bankruptcy or a seizure under execution, Tiffany, Real Property (1920), 2d ed., Vol. I, Sec. 639. On the other hand the liability of a contingent remainder to claims of creditors will ordinarily depend on its alienability. Simes, *op. cit.*, Vol. III, Secs. 736-737. But see Ohio Gen. Code, Sec. 11,655 which states that "vested legal interests" are subject to execution and thereby impliedly excludes contingent interests. *Peck* v. *Chatfield*, 24 Ohio App. 176, 156 N.E. 459 (1927).

A joint tenant is quite commonly given power to compel partition; see n. 25, *supra*. But this is not true with respect to holders of contingent future interests. In general see Simes, *op. cit.*, Vol. III, Sec. 665. It has been held that the Ohio partition statute, General Code, Sec. 12,026 does not empower even a vested remainderman to compel partition. *Eberle* v. *Gaier*, 89 Ohio St. 118, 105 N.E. 282 (1913).

Because of the difference in quantum of estate acts, which if committed by a life tenant would constitute waste, may not constitute waste when committed by a cotenant in fee. Furthermore, the statutory action for waste given to a cotenant is primarily an action for damages; Thompson, Real Property (1924), Sec. 1868; whereas a contingent remainderman would probably be limited to injunctive relief. Simes, *op. cit.*, Vol. III, Sec. 625. See Ohio Gen. Code, Sec. 10,503-23.

[51] 129 Ohio St. 432, 195 N.E. 838 (1935).

the co-owners for the incident of survivorship. In permitting the survivorship the court made no reference to the Hutchison case or to the requirement of a contract between the co-owners. It based the recognition of survivorship in a joint deposit Section 9648 of the General Code of Ohio. This code section is in the division and chapter of the Ohio General Code dealing with the organization and powers of building and loan associations. There is a similar section pertaining to banks in the chapter dealing with the powers and duties of the superintendent of banks.[52] Each of these sections authorizes a depository institution to pay funds to the survivor of joint depositors when the deposit carries a stipulation for a right of survivorship. The language of these provisions would seem to indicate that they are for the protection of the depository institutions and not intended to control the rights of the depositors as against each other. This has been the interpretation of the sections made by some Ohio judges[53] but there is some authority in accord with the position of the Supreme Court.[54] On the basis of this opinion in *Oleff* v. *Hodapp*, no inference can be drawn from the joint account cases as to the probabilities of recognition of the right of survivorship in other situations.

Conclusion

A co-trusteeship, whether testamentary or non-testamentary, presents a situation in which there is real need for an estate with an incident of survivorship. In other situations of co-ownership the need is not so pressing but there is a quite common desire to create interests with an incident of survivorship. Frequently parties who seek to create a joint tenancy merely wish to avoid making wills. It is not sufficient to point out that

[52] Gen. Code, Sec. 710-120.

[53] *In re Estate of Morgan*, 28 O.C.A. 222 (1918); and see the dissenting opinion of Williams in *Oleff* v. *Hodapp*, 129 Ohio St. 432 at 446; see also Opinions of the Attorney General for Ohio 1920, p. 479 and 1921, p. 143.

[54] *Bank* v. *Van Vlack*, 310 Ill. 185, 141 N.E. 546 (1923); and see *Gors* v. *Huss*, 10 Ohio L. Abs. 173 (1931); *Re Rehfeld's Estate*, 198 Mich. 249, 164 N.W. 372 (1917).

a will would ordinarily be preferable because of its revocable character. To avoid lawyers' fees, or the cost or delay incident to probate, or because of an ill defined dislike of wills, people will seek other devices for the passing of ownership on death. To a husband and wife whose wealth consists primarily of a parcel of real estate, a few securities, or a bank account, a joint tenancy may be a fairly satisfactory substitute for a will. But whether persons are motivated by a desire to avoid will making or by some other reason if it is clear that they intended to create an estate with incident of survivorship that intention should be respected and made effective unless it contravenes some social policy or some legal doctrine which is worth preserving. Rules of law which serve no purpose other than to defeat a legitimate intention of a grantor or testator cannot be justified.

In the survivorship cases which have been presented to it, the Ohio Supreme Court has expressed an unreceptive attitude toward the incident by survivorship. The opinions in these cases have not been supported by convincing reasons, nor are they consistent with each other. The early opinions in which extreme hostility was expressed, evidence a misconception of the characteristics and social implications of a joint tenancy. Recent opinions have not contained a repudiation of the early opinions nor have they offered any satisfactory explanation for the apparent lack of consistency between the earlier and later cases. In some recent cases where an explanation might have been expected none was offered and in one case which did not call for any discussion of the incident of survivorship the court purported to base a recognition of that incident on a theory of contract between the co-owners. This added to the confusion because this theory was not consistent with other recent cases and because the opinion assumed that there is no difference between an incident of survivorship and a remainder to a survivor of two tenants in common for life. In the most recent case on the problem the Supreme Court based a recognition

of this incident on certain statutes relating to banks and building and loan associations. The court suggests that these statutes were the basis of the first recognition of survivorship in joint account situations in former cases but the statutes had not been mentioned in those preceding cases.

No very helpful generalization can be drawn from these opinions. On the other hand the decisions, as distinguished from the opinions, are consistent with each other. None of the decisions is incompatible with the recognition of the estate of joint tenancy. All the decisions are in accord with the proposition generally accepted in other jurisdictions that a tenancy in common will be preferred to a joint tenancy as a matter of construction, but a joint tenancy, with the incident of survivorship, will be permitted where it clearly appears that such an estate was intended. It would seem desirable for the Ohio courts to adopt this proposition.